

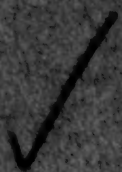
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In the Supreme Court of the  
United States

October Term, 1943.



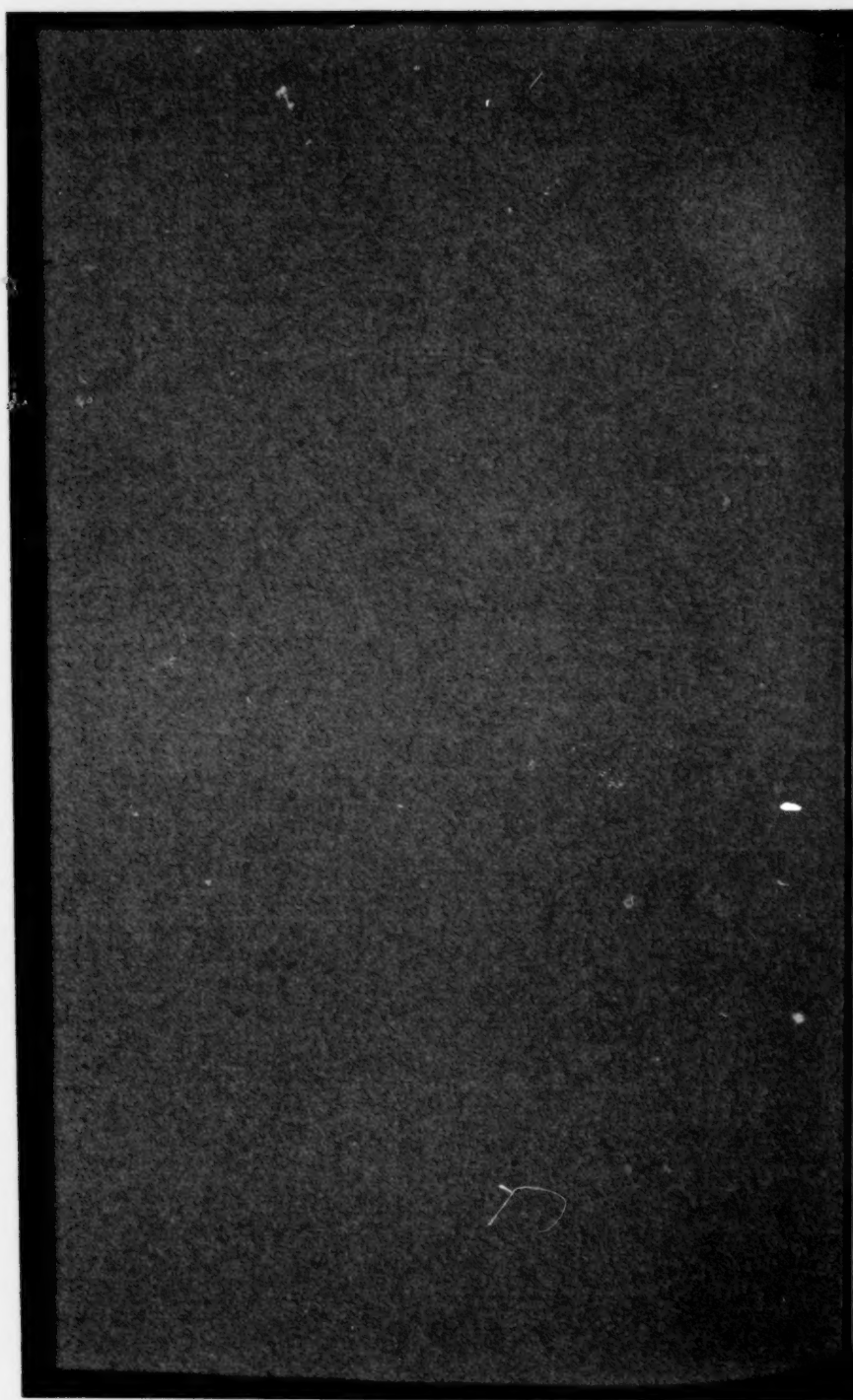
BOYD L. KITHGART, *Petitioner,*

VS.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,  
*Respondent.*

PETITION FOR WRIT OF HABEAS CORPUS TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT AND PRAYER FOR  
RELIEF THEREOF.

PAUL E. ...  
MARTIN J. ...



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# In the Supreme Court of the United States

October Term, 1945.

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BOYD L. KITHCART, *Petitioner,*

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,  
*Respondent.*

---

No. ....

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUP- PORT THEREOF.

*To the Honorable Supreme Court of the United States:*

Your petitioner respectfully says:

A.

### Summary statement of the matter involved.

Petitioner, a citizen of the United States of America, resident in Missouri, made a contract with respondent on June 14, 1929 (3), in which contract petitioner was insured against accidental loss of life, limb and time from accidental injury. At said time respondent, a New York

corporation, was engaged in the business of making such contracts with citizens of the United States, resident in Missouri (3).

Petitioner instituted an action to reform said contract in a Missouri State court on February 24, 1944. Respondent removed the case to the Western Missouri District Federal court. Petitioner filed his plea to the jurisdiction, alleging that Sections 28 and 29, Judicial Code (71, 72, Tit. 28 U. S. C. A.), were void because in conflict with Amendments XIV, X and IX of the Constitution. Respondent moved to dismiss, alleging that (45-46):

“The pretended cause of action alleged or attempted to be alleged in plaintiff’s first amended petition or first amended complaint is barred by laches and by the Statutes of Limitation of the State of Missouri.”

The amended pleading combined a count or suit in equity with a count on an action at law in two counts.

The District Court overruled the plea to the jurisdiction (48) and sustained the motion to dismiss on another alleged ground that the judgments in five prior actions (one stated by the Court of Appeals to be on the policy as it stood (74), and two suits in the nature of bills of review of that case, and two actions for damages against respondent and appellants, all of said actions being on alleged causes of action different from this reformation suit) were *res judicata* (50) of the issues in the suit to reform.

On July 31, 1945, the Court of Appeals affirmed the judgment of dismissal, declined to rule on the question of *res judicata*, and placed its affirmance on the baseless ground that the action was barred by Sections 1013 and 1014, R. S. Mo. 1939. Neither of said statutes nor any statute was pleaded by respondent. The ineffective plea

of limitations was not directed at either count of petitioner's pleading. The District Court dismissing, recited (49):

"Plaintiff claims he sustained an accident compensable under the contract. He alleges, however, that an essential provision of the contract actually agreed upon was that the plaintiff was sound in mind and body when the contract was entered into. That provision of the contract, it is alleged, was embodied in certain documents attached to the application. The contract sought to be reformed, it is alleged, does not contain the provisions referred to."

The District Court order overruling the plea to the jurisdiction, recites (48):

"The (removal) statute plainly is authorized by Section 2 of Article III of the Constitution. It has been so held by the Supreme Court (as to diversity of citizenship cases) at least since the decision of *Insurance Company v. Dunn*, 19 Wall. 214, a case decided in the October, 1873, term of the Supreme Court. That decision was bottomed on principles declared in *Martin v. Hunter*, 1 Wheaton 333."

The District Court ignored the fact apparent from his petition that petitioner instituted the suit "as a citizen of the United States, resident in Missouri." It erroneously ruled that the suit was "wholly between citizens of different States" within the meaning of said language in Sec. 28, Judicial Code (71 U. S. C. A.).

The Court of Appeals placed its affirmance of the ruling on the plea to the jurisdiction on the same theory, ignoring the above allegation (3) and petitioner's contentions that this was a suit between petitioner "as a citizen of the United States" and respondent "who entered into the

contract with him as a citizen of the United States," which contentions, based on the pleaded facts, were made in petitioner's brief in the Court of Appeals. We reproduce page 9 of said brief:

“9

**“STATEMENT OF POINTS TO BE ARGUED  
AND AUTHORITIES.**

“I.

“The District Court erred in refusing to take notice of the alleged and admitted fact that appellant is a citizen of the United States, and that the Acts of Congress, Secs. 71 and 72, Title 28, U. S. C. A., as applied to appellant as such citizen denied him the protection of the privileges and immunities clause of the XIVth Amendment, which guaranteed to appellant as such citizen the right to institute and maintain this action in the courts of any State of the Union, including Missouri.

“A. The petition alleges appellant’s citizenship of the United States, and that appellee’s business was to insure such United States citizens resident in Missouri, which facts appellee’s motion to dismiss admit.

“B. The command of the Act of Congress (Section 72) to the State Court ‘to proceed no further’ on the filing of the verdict petition and bond is, as applied to appellant in his capacity as a citizen of the United States, in direct conflict with said provision of the Constitution guaranteeing him the right to maintain this suit in the Missouri court, and in conflict with the IXth and Xth Amendments, and therefore void.

Section 1, XIVth Amendment (privileges and immunities clause).

*Corfield v. Coryell*, 1 Wash. C. C. 371, Fed. Cas. No. 3230.

*Crandall v. Nevada*, 6 Wall. 35-49.

*Bradwell v. Illinois*, 16 Wall. 130.

*Ward v. Maryland*, 12 Wall. 418.

*Ex parte Flukes*, 157 Mo. 125, 1. c. 131, 132.

*Colgate v. Harvey*, 296 U. S. 404.”

The opinion of the Court of Appeals, notwithstanding respondent's pleading failed to specify any statute of limitations, held that petitioner's action was barred by the provisions of Sections 1013 and 1014, R. S. Mo. 1939. The opinion says (78):

"The petition attempts to escape the general statute of limitations and to bring itself within the special statute, Mo. R. S. A., Sec. 1014, which allows an action for relief on the ground of fraud to be instituted within 5 years after the accrual of the right, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

The Court of Appeals stated (79):

"The trial court rested its dismissal or summary judgment-order on the ground that the insured's right to seek reformation was *res judicata*. Whether this ground was sound or not, we need not consider, for the bar of the statute of limitations is plain on the face of the petition."

The Circuit Court of Appeals cites *Guaranty Trust Company v. York*, 61 S. Ct. 1464, in support of its erroneous ruling on limitations (77). Said decision by this Court in the York case is in direct conflict with the said decision of said Court of Appeals.

Section 1014 was not mentioned in petitioner's pleading or briefs, nor in respondent's. The Missouri statutes or decisions hold that failure to plead the appropriate section of the statute of limitations waives it and that the Missouri court cannot plead it for him but must defeat him on that issue (*State ex rel. Matney v. Spencer*, 79 Mo. 314; *Knisely v. Leathe*, 256 Mo. 341; *Gibson v. Rans-*

dell, 188 S. W. (2d) 35), even though an action on the face of the petition be barred by an unpleaded statute (*Gibson v. Ransdell*, 188 S. W. (2d), l. c. 38; *Murphy v. De France*, 105 Mo. 53).

But the action was not barred. Sections 1012, 1031 and 5844 prevented the action from accruing until March 2, 1942. The proviso of Section 1012 added thereto in 1919 (Laws Mo. 1919, pp. 211-212) is made applicable to Section 1031, which latter statute provides that if any person by any "improper act" prevent the commencement of an action, such action may be commenced within the time limited by the other sections of Article 9, Chap. 6, R. S. 1939, after the commencement shall have ceased to be so prevented. And so, under Section 1013, petitioner had ten years after March, 1942, or at least after February 25, 1939, to institute the reformation suit.

Respondent's policy did not cover insane persons (Clause 9, 29). Petitioner's discharge record from the army recited that the form of insanity known as dementia praecox was the cause of his discharge. Respondent made an investigation and had petitioner examined by its own doctor, who found that petitioner was sound in body and mind and procured an affidavit from the army doctor establishing that the recital as to dementia praecox was a mistake. Thereupon respondent agreed that an explanatory letter by Denison, its own doctor's report, the army doctor's affidavit showing said mistake and a proposed sound risk (9-10) agreement should be attached to petitioner's application and with said application sent to respondent's home office for approval; and, if there approved, that said sound risk agreement with its standard policy would constitute the insurance contract; and that neither said army record nor any prior evidence

should ever be used by respondent in the event of any litigation with petitioner (10).

The premium for \$19.70 was paid on June 14, 1929, by the check of petitioner's mother (11, Exhibit E, 37) and cashed on June 17 by respondent's manager (11). On June 14 the blanks in respondent's usual form of printed receipt were filled in as to date and the amount of \$17.70 by respondent's agent, Denison, but not signed by him (11-12, 37). At the same time Denison represented to petitioner that he did not know whether respondent would charge petitioner two dollars more as a consideration for the sound risk agreement (12). On June 25, Denison called on petitioner and undertook to deliver the policy, Exhibit A (27), and called petitioner's attention to the recital in the policy under the heading (29)

"Standard Provisions.

"1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance *except as it may be modified by the Company's classification of risks and premium rates.*  
• • •"

and also stated that the sound risk agreement was not attached to the policy for the reason that it was respondent's "classification of risk" of petitioner within the meaning of said quoted language and hence excepted by said exception from the preceding provision said that:

"This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance, • • •"

and that said sound risk agreement did not need to be attached to the policy for said reason, but that nevertheless it was a part of the contract of insurance and that

respondent was holding same as a part of its record, but in trust for petitioner. The sound risk agreement itself as represented and prepared by Denison expressly declared that it was respondent's "classification of risk" and excepted from attachment to the policy. Said provision is (10):

*"That first party hereby classifies the second party as a sound risk, and is hereby estopped from all objection that any prior mental or bodily diseases or infirmity contributes to any future disability of the second party after said date. That no insurance is in force on this contract unless and until the Home Office of first party has approved the present contract, and that the approval of the Home Office will be and is sufficiently evidenced by the delivery of said policy to the second party. That said policy contains substantially the same agreements and declarations as this contract, and that this contract is hereby made a part of said policy, just as much as if it were printed therein."*

As Denison promised, Marquis appeared on June 29, 1929, and signed his name to said receipt and on the side thereof wrote the words:

"Received two dollars more \* \* \* M. E. Marquis"  
12, 37).

Denison's attention was called to the omission of the sound risk agreement from the copy of the application attached to the policy before delivery (11). Denison then represented that the omission was not a mistake (20), that it was not necessary to attach same to the policy, under provisions 1 and 2 of the standard provisions thereof (14). He further represented that the sound risk agreement was not an alteration or change in the policy under provision 2 thereof (14, 15). He also represented that the sound

risk agreement contained the same declaration and agreement with reference to sound health of body and mind as the application and policy (15, 10). Petitioner relied on said representations of Denison as Denison also represented to petitioner that he had theretofore long been an assistant manager for respondent, was familiar with its rules, regulations and methods of business, and that he had superior knowledge of the law of insurance, and was an expert in all branches of respondent's insurance business (15, 19). Petitioner believed Denison with reference to said matters, and especially with reference to the lack of necessity for attaching the sound risk agreement to the policy.

Though Denison was then in respondent's employ, he told petitioner that he was not in respondent's employ and was without authority to make the contract with petitioner, but that he (Denison) was only aiding Mr. Marquis, stating that Marquis was the authorized agent and that Marquis would receive the commission for making the insurance contract. Marquis was not present during the negotiations.

Thereafter, in December, 1929, petitioner paid a second premium. On January 11, 1930, petitioner accidentally sustained a totally disabling injury. Respondent refused to carry out its contract. Petitioner then engaged counsel, and both petitioner and his then counsel, believing that under the facts the sound risk agreement was part of the insurance contract, brought a suit to recover for permanent disability.

The cause found its way to the Federal court by removal, and at a trial in May, 1933, respondent, through its agents, witnesses and counsel, denied all knowledge of said sound risk agreement, denied that Denison was in respondent's employ either on June 14 or 25, 1929, and

objected to any evidence thereof, with the result that a judgment was rendered against petitioner. Denison, concealed by respondent, was not a witness (21).

Respondent concealed Denison's whereabouts from June, 1929, until 1935, when petitioner discovered him as respondent's manager in Salina, Kansas (21). Denison then refused to talk to petitioner and thereupon petitioner, pursuing a mistaken remedy, instituted a proceeding in the nature of a bill of review in the District Court, seeking to have the judgment of May, 1933, set aside. The District Court dismissed, and the Court of Appeals affirmed (88 Fed. (2d) 407). Its opinion treated Denison as a mere soliciting agent, whose conversations or representations did not bind respondent. Its opinion also declared that the purpose of the suit was to secure a new trial in the prior action at law and that "it is a strain upon the credulity of the court to believe that it was brought in good faith" (l. c. 411).

Two further mistaken actions for damages by petitioner against Denison, respondent and other agents, in the State court, were removed to the Federal court and promptly dismissed.

On February 25, 1939, petitioner obtained a photostatic copy of an application signed by him from respondent's assistant manager, with the signature of Marquis thereon as a witness instead of that of Denison. Denison's signature as a witness was purported to be typed on the copy of the application attached to the policy. An investigation then made resulted in the discovery that petitioner's contract was valid; that, notwithstanding the representations to the contrary, Denison was its agent on June 14 and 25, 1929; that Denison did have authority as respondent's agent to make the insurance contract; that the sound risk agreement was approved by respondent and signed

by respondent's district manager, Magoon, before delivery of the policy to petitioner on June 25, 1929.

Thereupon, petitioner still believing that the sound risk agreement did not need to be attached to the policy, in accordance with rule that a contract may consist of more than one paper, and that his newly discovered evidence would establish that fact and that he could have the judgment of 1933 set aside for concealment of evidence, instituted a further misconceived or mistaken proceeding in the District Court, which was promptly dismissed, and the judgment of dismissal was affirmed by the Court of Appeals (119 F. (2d) 497). Thereupon, petitioner *pro se* sought a writ of certiorari, which failed to state any legal grounds therefor, in this Court, which was properly denied (315 U. S. 808, No. 789) on March 2, 1942. Affidavits filed in said cause state facts with reference to discovery of the only competent evidence. Thereupon, petitioner for the first time ascertained, or became fully convinced that he and his then counsel had been pursuing mistaken remedies and that reformation was necessary.

The Court of Appeals, in its opinion, states (76, 76-77):

"The reason given for the present attempted reformation is that the insured has been denied the right in his previous litigation to make proofs of this special provision as part of his contract, in view of the clause in the policy that 'No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.' The petition shows on its face, however, that that denial had been made as far back as 1933, by the insurer's objection and the trial court's ruling in the action initially brought on the policy, from which the insured took no appeal." \* \* \*

"The insured thus was advised, in 1933, by a specific legal ruling against him, which he did not

attempt to make the subject of an appeal, that it was impossible for him to claim the existence of any such extraneous provision to the policy in an action at law to recover benefits under it. In spite of this ruling, he has waited almost 11 years before bringing this suit for reformation."

But petitioner could not have instituted the suit to reform the insurance contract until February 25, 1939, because all of his knowledge that the sound risk agreement was approved by respondent was Denison's statement on June 25, 1929, to that effect. When respondent in May, 1933, at the trial, disclaimed all knowledge of said agreement, concealed and kept its employee, Denison, off the witness stand, and concealed his whereabouts until 1935, and the respondent's witnesses testified that Denison was not in the employ of respondent in June, 1929, then petitioner was led to believe that respondent had not approved, and he was without actual knowledge (other than Denison's statement repudiated by respondent at said trial), and without competent evidence to sustain any suit for reformation until on and after February 25, 1939, when he obtained the information embodied in affidavits on file in this Court in Cause No. 789 (October term, 1941), showing Denison's authority and respondent's approval, making the contract valid.

Petitioner himself was incompetent because he had no personal knowledge, at that time, of facts which bound respondent and was wholly without any witness to sustain any reformation suit; and this was a direct result of the improper acts of respondent, which operated under Sections 1031 and 1012, supplemented by Section 5844, to toll the statute of limitations by preventing the commencement of the reformation suit.

These facts destroy the conclusion of the Court of

Appeals that his cause of action accrued when respondent's witnesses Magoon and Marshall testified that they had no knowledge of the sound risk agreement; whereas said testimony, for the purpose of reformation, demonstrated that petitioner could not use them as witnesses, and that petitioner was led to believe that respondent did not make the contract. And also their testimony established, for reformation purposes, that Denison had no authority to make the alleged contract, and that Marquis was never present during the negotiations with Denison; and hence petitioner was wholly without any evidence on which to base the reformation suit until after February, 1939.

The Court of Appeals in its affirming opinion overlooked allegations that respondents defense in that action at law and the false statements of respondent's agents as to the lack of Denison's authority and that he was not in respondent's employ on June 14 and 25, led petitioner to believe that Dennison and the other agents

*"had not forwarded the said documents (sound risk agreement and other papers) to the home office of said defendant and that for said reason the plaintiff did not have a valid contract of insurance until February 25, 1939, on which date he again went to the office of the said defendant and requested its agent Marshall to give to plaintiff the original application signed by plaintiff, and that thereupon the said Marshall gave to this plaintiff the document with plaintiff's signature thereon and the name of M. E. Marquis which had been secretly and against the will of plaintiff signed thereto as a witness; photostatic copy of which is attached hereto as Exhibit C, which was different from the application as signed by R. G. Denison.*

*"That, on receiving said document on February 25, 1939, plaintiff immediately made an investigation*

*and discovered that in truth and in fact the said agents had signed said document and said typewritten part of said insurance contract \* \* \* and forwarded same to the home office of defendant."*

The Court of Appeals overlooked (13) not only Section 1031, but also overlooked the fact that said section is quoted in *Rogers v. Brown*, 61 Mo. 187 (cited by the Court of Appeals), at p. 193 and points out that the equity doctrine as it existed before the statute was supported thereby to some extent but no

"farther than it may be found to have been incorporated in the provisions of the 24th section (Sec. 1031, R. S. Mo. 1939) above quoted" (l. c. 194).

The Missouri court further said that no issue was made in *Rogers v. Brown*

"as to any improper action on the part of defendants, preventing *the commencement of an action.*"

The action for reformation was not barred by any Missouri statute of limitations under the facts and Section 1014, R. S. Mo. 1939, only applied to actions based on fraud and could not apply to an action based on contract, and in any event Sections 1012 and 1031 applied to Section 1014.

The Court of Appeals overlooked the fact that the central paragraph on page 23 alleged a conspiracy in violation of Section 4632, R. S. Mo. 1939, and that the meticulous allegations between pages 5 and 23 concerned overt acts pursuant to said conspiracy to cancel and to prevent the commencement of the action, and that it is still

and is now continuing and that in such case the law of Missouri is thus:

“The period of limitation commenced upon the occurrence of the last of the series of overt acts (resulting in damage) under the conspiracy.” (*Kansas City v. Rathford*, 186 S. W. (2d) 570, l. c. 577.)

The Court of Appeals cites *Stark v. Zander*, 204 Mo. 442, and *Hoester v. Sammelman*, 101 Mo. 619, where fraud preventing the commencement of an action was not alleged as applicable to the facts in this case. But *Stark v. Zander* has no application. The opinion there says:

“The case made in the petition is one of innocent mutual mistake.” (l. c. 453.)

The opinion then sets out Section 4290, R. S. 1899. It is the same as Section 1031, R. S. Mo. 1939. It further says:

“It is not charged that either of the defendants was guilty of any act that prevented the plaintiffs from commencing their suit to reform the deeds. Indeed the averment of mutual mistake negatives the idea of fraudulent conduct.” (l. c. 453.)

The Missouri Supreme Court, in *Citizens Bank of Festus v. Frazier*, 177 S. W. (2d) 477, l. c. 482, refused to follow said decisions in a case where the principle involved was like that at bar, saying:

“The cases (*Stark* and *Hoester*, *supra*) are not controlling here. We think that Sec. 1031, R. S. 1939, Mo. R. S. A., is applicable to the facts here since defendants *Frazier* and wife, by continuing fraudulent conduct concealed the original fraud and prevented and delayed the commencement of the action. The

action was timely brought and was not barred by Section 1013, *Supra. Chubine v. Frazier*, 346 Mo. 1 *Branner v. Klaber*, 330 Mo. 306."

These facts make the principles stated in *Sonninfield v. Millinery Co.*, 241 Mo. 309, applicable. The defendant there prevented the commencement of the action by keeping possession of the papers on which it was founded and other misrepresentation. This act was held, under Section 1031, R. S. Mo. 1939, to toll the statute of limitations.

Petitioner had theretofore believed that Denison's representation that he had been respondent's assistant manager and had been familiar with the making of insurance contracts, and therefore knew everything about the making of insurance contracts both as to law and fact, that therefore his representations in connection with the above quoted provision of the policy were correct until the Circuit Court of Appeals (119 Fed. (2d) 497) held the evidence inadmissible, and this Court, by denying certiorari, finally appraised and convinced him that the policy should be reformed by this suit for reformation thereof, under the law as stated by this Court in *Northern Assurance Company v. Grandview Building Association*, 203 U. S. 106 (followed by the Missouri court in *Baumhoff v. Railway*, 203 Mo. 268), and also as stated in *Equitable Ins. Co. v. Hearne*, 20 Wall. 294, and other cases.

## B.

**Statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question.**

The decision and opinion of the Circuit Court of Appeals applied the unpleaded and inapplicable Section 1014 R. S. Mo. 1939 to bar petitioner's action. It ignored

Sections 1012 and 1031 R. S. Mo. 1939, which prevented the action from accruing until respondent's "improper acts" ceased to prevent the commencement of the action, either on February 25, 1939, or March 2, 1942, after which dates petitioner had the ten years authorized by Section 1013 to sue. *Butler v. Lawson*, 72 Mo. 227.

It ignored the construction of the Missouri statute of limitations in *Matney v. Spencer*, 79 Mo. 314; *Knisely v. Leathe*, 256 Mo. 341, and *Gibson v. Ransdell*, 188 S. W. (2d) 35, l. c. 38, and thereby violated Section 725, Title 28, U. S. C. A., even as construed by this Court in *Swift v. Tyson*, 16 Pet. 1, declaring:

"The true interpretation of the thirty-fourth section limited its application to State laws strictly local, that is to say, to the positive statutes of the state, and to the construction thereof adopted, by the local tribunals."

The decisions of this Court in *Guaranty Trust Company v. York*, 65 S. Ct. 1464, applying said acts of Congress to suits in equity, and in *Erie R. Co. v. Tompkins*, 304 U. S. 64, were likewise ignored by the decision and opinion of said Court of Appeals.

This Court has jurisdiction to review the judgment of the Court of Appeals and the record, because it appears from the opinion and record that said Court of Appeals denied to petitioner the benefit of the law of the State of Missouri with reference to the statutes of limitations of said State by itself selecting an unpleaded statute of limitations which was without application to the action grounded on contract sued on, and applying a statute which only applied to actions grounded on fraud, whereas said action was not barred by any statute of limitation of the State of Missouri.

The Circuit Court of Appeals also failed to include in its opinion, and ignored in its decision, the facts admitted by respondent that it had, by its own wrongful acts of the variety mentioned in Section 1031, R. S. Mo. 1939, prevented the commencement of the action until March 2, 1942, and therefore prevented any statute of limitations from barring petitioner's action for reformation. Said opinion and decision of said Circuit Court of Appeals on said questions is in direct conflict with the opinions and decisions of this Court in *Guaranty Trust Co. of New York v. York*, 65 S. Ct. 1464, *Erie R. Co. v. Tompkins*, 304 U. S. 64, *Holmberg et al. v. Armbrrecht et al.*, (C. C. A. 2) 150 F. (2d) 829.

The Court of Appeals has decided an important question of federal law which has not been settled by this Court, to-wit: whether the privileges and immunities clause of the XIVth Amendment guarantees to a citizen of the United States a right to maintain a suit to its conclusion by a decision of the issues therein in a State court in which he had instituted it. The Court of Appeals erroneously disposed of the case by deciding that the suit was wholly between citizens of different States; whereas it was not, but was between a citizen of the United States resident in Missouri, and a nonresident corporation which had contracted with him as a citizen of the United States. Said question has not been but should be settled by this Court. Said decision is probably in conflict with applicable decisions cited herein.

Said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to fail to state the facts in its opinion which appear from the petition, showing that respondent by the wrongful acts mentioned in Section 1031, R. S. Mo. 1939, prevented the institution of petitioner's suit until March, 1942. And has

also so far departed from said course that it ignored the allegations of the petition showing that petitioner is a citizen of the United States, and that as such citizen he made the contract with the respondent, and then, in its opinion, merely declared that the action was wholly between citizens of different States.

The Court of Appeals, by affirming the judgment of the District Court, so far sanctioned the departure of the District Court from the accepted and usual course of judicial proceedings in using the following language concerning petitioner and his case when he dismissed it (49, 50), to-wit:

"This venerable controversy haunts us like a ghost which cannot be laid. Once our colleague put an end to it. Twice we buried it. Twice the Court of Appeals not only refused to resurrect it, but almost spat on the grave. Here it comes again.

"It is difficult to avoid thinking that the plaintiff individually (not his learned and highly esteemed counsel) has set out to harass both the defendant and the courts."

### C.

#### The Questions Presented.

Whether said language established a personal prejudice against petitioner which disqualified the District Judge and deprived the District Court and Judge of jurisdiction to decide the case and deprived petitioner of the benefit of due process.

Whether or not the decision of the Circuit Court of Appeals, in applying a nonapplicable statute of limitations, not even pleaded, of the State of Missouri to bar petitioner's action for reformation of a contract, to which action said statute had no application and which statute

did not, nor did any other under the law of the State as decided by its appellate courts, bar the action, by its conflict with the decisions in *Guaranty Trust Company v. York*, 65 S. Ct. 1464, *Erie R. Co. v. Tompkins*, 304 U. S. 64, and *Holmberg v. Armbrrecht*, 105 Fed. (2d) 829, render its judgment invalid.

Whether or not the privileges and immunities clause of Section 1 of the XIVth Amendment to the Constitution of the United States guaranteed to petitioner as a citizen of the United States the right to "maintain" his suit for reformation against respondent in the Missouri State Court in which he had instituted said suit or action, until said court had exhausted its jurisdiction by deciding the issues therein. Whether Sections 28 and 29 of the Judicial Code (71, 72, Title 28 U. S. C. A.) are void because in conflict with the XIVth, IXth and Xth Amendments thereto.

Whether or not the Circuit Court of Appeals by ignoring the allegation in petitioner's pleading that he was a citizen of the United States, and that respondent made the contract sought to be reformed with him as such citizen, could lawfully ignore said allegation and dispose of the case by deciding that it was a controversy wholly between citizens of different States.

Whether or not the Court of Appeals could dispose of the case by omitting from its opinion the fact showing that respondent had, by its improper acts, within the meaning of Section 1031, R. S. Mo. 1939, prevented the accrual of petitioner's right to, or action for, reformation, and the commencement of the action under Section 1012.

Whether the failure of the Circuit Court of Appeals to reverse or approve the action of the District Court in erroneously holding that the judgments in prior actions based on the policy alone were *res judicata* of the different

issues and subject matter of the suit for reformation based on the entire contract, consisting of the policy and sound risk agreement, departed from the accepted and usual course of judicial proceedings.

Whether a nonresident corporation, in a case where there is no local prejudice or influence, in a State in which a suit against it was filed by a resident of a State, may give the Federal Court jurisdiction thereof by removal.

Whether fatuous pursuit of mistaken remedies occasioned by respondent's wrongful acts did not prevent the accrual of the cause of action for reformation until February 25, 1939, or March 2, 1942.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(As to Limitations.)

### I.

The allegations concerning fraud in petitioner's pleading were set up to avoid limitations and laches, under the Missouri rule as outlined in Section 1031.

The basis of the action is contract, and not fraud, so that Section 1014 has no application to bar the action on any ground. (*Turnbull v. Watkins*, 2 Mo. App. 235, l. c. 239, and *Brack v. Cohn-Hall-Marx Co.*, 276 N. Y. 259, show that action was on contract and not on fraud.)

And so the Court of Appeals erroneously selected and applied an inappropriate State limitation statute, contrary to the rule stated in Section 725, Title 28, U. S. C. A., and by this Court in *Guaranty Trust Company v. York*, 65 S. Ct. 1464. That decision held that a Federal court must apply a State statute of limitations which bars an action, not a statute which does not bar such action.

By so ruling, the Court of Appeals denied petitioner the equal protection of the law of the State of Missouri, contrary to *Erie Railway Co. v. Tompkins*, 304 U. S. 64.

### II.

Respondent's pleading failed to specify any section of the Missouri statute of limitations as a bar, and so, under the law of that State as declared in *Gibson v. Ransdell*, 188 S. W. 35; *Knisely v. Leathe*, 256 Mo. 341; *State ex rel. v. Spencer*, 79 Mo. 314; *Murphy v. De France*, 105 Mo. 53, and *Canada v. Daniel*, 175 Mo. App. 55, the Missouri statute of limitations selected by the Court of

Appeals could not have been applied, even had it been a bar without violating Section 725, Title 28, U. S. C. A.

Had the case been pending in the State Court, three blocks away, the judgment would have been for petitioner instead of respondent, because of failure to plead the section alone. And the lower courts were without jurisdiction to apply the bar of any statute of limitations in this case, not only because no such statute barred the action, but also because no such statute was pleaded. And so the erroneous decision of the Court of Appeals is in conflict with the ruling of this Court in *Guaranty Trust Co. v. York*, 65 S. Ct. 1464, and *Erie R. Co. v. Tompkins*, *supra*.

### III.

Even had petitioner's pleading shown on its face that the case was barred by an unpleaded Statute of Limitations, the Missouri court could only hold that by failure to specify the section it was waived and could not be utilized to bar the action without specifying the section. (*Gibson v. Ransdell*, 188 S. W. (2d), 1. c. 38.)

And therefore the decision in *Guaranty Trust Company v. York*, 65 S. Ct., and *Erie R. Co. v. Tompkins*, 304 U. S. 64, are in direct conflict with the opinion of the Circuit Court of Appeals herein.

### IV.

The Circuit Court of Appeals thought it measured the allegations of fraud set up to anticipate a defense by the rule stated in Section 1014, but it wholly failed to apply the applicable rules authorized by Sections 5844, 1012 and 1031. Therefore it erroneously selected an in-applicable State statute of limitation which did not bar the action. Its decision is therefore contrary to the law

of Missouri and contrary to Section 34, Judiciary Act, 1789, and the decision of this Court in *Guaranty Trust Company v. York*, 65 S. Ct. 1464, and is not in accordance with any law, State or Federal.

## V.

The opinion of the Court of Appeals failed to note or include the acts of concealment of respondent, supplementing its acts at the trial of the lawsuit in May, 1933, to the effect that it contended that respondent made no sound risk agreement with petitioner, and that respondent knew nothing of any such agreement, and that Denison was not in its employ, and by other statements, which led petitioner to believe that the documents attached to petitioner's application on June 14, 1929, had not been forwarded for approval to the Home Office of respondent, and that Denison did not have authority to negotiate contracts, and therefore petitioner did not know certainly that he had a valid contract, before February 25, 1939.

The benefit of Sections 1031 and 1012 and 5844, which tolled the limitation statute of the State of Missouri, was denied petitioner, contrary to the decision in *Guaranty Trust Co. v. York*, 65 S. Ct. 1464.

## VI.

The Court of Appeals, in applying the rule applicable to actions on the ground of fraud in Section 1014, to the reformation action grounded on contract and in failing to apply the rules declared in Section 5844 (binding respondent by the statements of Denison both as to law and fact, with reference to the terms, benefits and advantages of the contract of insurance) and in Sections 1012 and 1031—rendered a decision directly in conflict

with the decision of this Court in *Guaranty Trust Company v. York*, 65 S. Ct. 1464 and Section 34, Judiciary Act, 1789.

## VII.

The physical facts that respondent's policy did not insanity record and that the blank spaces in the printed form of receipt for the first premium (37) were filled in by Denison for \$17.70, two dollars less than the amount of the check of petitioner's mother's (Exhibit E 37) (11), coupled with the false representation that Denison (12)

"\* \* \* was ignorant as to whether defendant intended to charge plaintiff two dollars more in consideration of said waiver and estoppel agreement"

on June 14th, and that Marquis on June 29th (12) appeared and wrote the words "Received two dollars more. M. E. Marquis" (37) thereon, conclusively shows that the contract sought to be reformed was actually made, and that the highly intelligent and most impartial judges we have ever known, except in this case, erred in stating in their order, with the appellant judges' approval, dismissing the case (50):

"It is difficult to avoid thinking that the plaintiff individually (not his learned and highly esteemed counsel) has set out to harass both the defendant and the courts"

and that (49)

"Twice the Court of Appeals not only refused to resurrect it, but almost spat on the grave,"

which latter statement was based on the statement in the opinion of the Circuit Court of Appeals in *Kithcart v.*

*Metropolitan Life Insurance Company*, 88 Fed. (2d) 407, 411, wherein said court said:

"The bill of complaint is wholly without merit, and in view of the record in the original case, *it is a strain upon the credulity of the court to believe that it was brought in good faith.*"

And which court in said opinion from the facts then known to and alleged by petitioner also decided that Denison was without authority to bind respondent by his conversations and misrepresentations. Said statements established denial of due process.

### (As to Jurisdiction.)

#### I.

The reformation suit was not a controversy "wholly between citizens of different States," but between petitioner, "*a citizen and resident of the State of Missouri and the United States of America*" and respondent, a New York corporation engaged in the business of "insuring citizens and residents of the United States, resident in Missouri" (3); and therefore was not removable under Section 28, Judicial Code.

#### II.

The command of the XIVth Amendment that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" guaranteeing a United States citizen not only the right to "institute," but to "maintain" the reformation suit in the courts of his own state or any other, is in conflict with and destroys the command of Section 29, Judicial

Code, providing that when a nonresident defendant files a petition and bond to remove " \* \* \* it shall then be the duty of the State court \* \* \* to proceed no further." Said Section 29 is therefore void because it purports to compel a state to disobey the Supreme law (clause 2, Article VI, Constitution U. S.).

### III.

The privileges and immunities secured by Section 2 of Article IV of the original Constitution included "the right of a citizen \* \* \* to institute and *maintain* actions of any kind in the courts of the State." (*Corfield v. Coryell*, Fed. Case No. 3230).

"The 'privileges and immunities' secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.

"'But the Fourteenth Amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely un-abridged, unimpaired'."

Slaughter House Case No. 8,408, per Justice Bradley.

*Colgate v. Harvey*, 296 U. S. 428.

"And while the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship."

*Colgate v. Harvey*, 296 U. S. 427.

*Arver v. United States*, 245 U. S. 366, 377, 388, 389.

“ ‘By the original constitution, citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. \* \* \* and citizenship in a state is a result of citizenship in the United States’.”

*United States v. Hall*, Fed. Cas. No. 15,282.

#### IV.

The XIVth Amendment compelled Missouri to accord to petitioner the same privileges and immunities as it must accord to a citizen of any other state, and included in such privileges and immunities is the right not only to institute but to maintain any action in the State court granted to petitioner by said clause of the XIVth Amendment.

Therefore, the State of Missouri did not lawfully obey the Act of Congress commanding it to proceed no further in petitioner's suit for reformation, because by doing so Missouri disobeyed the command of the privileges and immunities clause of the XIVth Amendment.

#### V.

The Slaughter House cases recognized that a citizen of the United States is guaranteed the right of access to the courts of the states by the XIVth Amendment, which, of course, means the right to institute and maintain actions in said courts. (16 Wall. 36.)

#### VI.

The Constitution, providing that the judicial power should extend to controversies between citizens of different states, did not disturb the concurrent jurisdiction of State and Federal courts with reference to said contro-

versies, in accordance with principles stated by Hamilton in his *Federalist* No. LXXXII, when he said:

“The principles established in a former paper (No. 32) teach us that the States will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible.”

## VII.

And so the rule as to concurrent jurisdiction stated in *Harkrader v. Wadley*, 172 U. S. 148, l. c. 164, prevented the removal of any case of which the State court had concurrent jurisdiction with the Federal court to the Federal court. That rule is thus stated:

“When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.”

Hamilton, even before the adoption of the IXth and Xth Amendments, recognized that the only way a case of which a State court had concurrent jurisdiction could have the judicial power of the United States extended to it was by an appeal, as pointed out in his *Federalist* LXXXII:

“And this being the case, *I perceive at present no impediment to the establishment of an appeal from*

*the state courts, to the subordinate tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the state courts, to district courts of the Union."*

### VIII.

The statement of Judge Wright in *Teal v. Felton*, 12 How. 284, 13 L. Ed. 900, l. c. 292, as follows:

"After citing the 2d section of the 3rd article of the Constitution, he adds, '*This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusive or any attempt to oust the State courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the State courts but to define the limits of those granted to the federal judiciary,*'"

coupled with the language of Chief Justice Marshall in *Hodgson v. Bowerbank*, 5 Cranch 303:

"Turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution,"

conclusively establishes the truth that, since the Constitution did not oust the State courts of that concurrent jurisdiction which it thus retained, then the Congress could not go beyond the Constitution and deprive them of that concurrent jurisdiction by the removal acts.

## IX.

The District Court made the following statement in its memorandum and order of dismissal (49, 50):

"This venerable controversy haunts us like a ghost which cannot be laid. Once our colleague put an end to it. Twice we buried it. Twice the Court of Appeals not only refused to resurrect it, but almost spat on the grave. Here it comes again (49).

"2. We shall sustain the motion to dismiss on the second ground set out in the motion, that the amended petition shows on its face, when supplemented by facts of which judicial knowledge is taken, that the controversy presented is *res adjudicata* (50).

"It is difficult to avoid thinking that the plaintiff individually (not his learned and highly esteemed counsel) has set out to harass both the defendant and the courts" (50).

The only matter in the record justifying the finding of the District Court that the Circuit Court of Appeals "almost spat on the grave" of the case was its statement that "it is a strain upon the credulity of the court to believe that it (petitioner's suit) was brought in good faith." (88 Fed. (2d) 411).

As to whether said statements disqualified the District court, through prejudice against petitioner and in favor of respondent, to render any judgment in the case, and operated to deny petitioner due process, is a question now submitted. (See *Tummev v. Ohio*, 273 U. S. 510; *Morgan v. United States*, 304 U. S. 1; *Whitaker v. McLean*, 118 Fed. (2d) 596, where the disqualifying remarks during a trial disqualified the judge and rendered his judgment void.)

The State of Missouri holds that prejudice by a judge

against a party causes the court to lose jurisdiction, and that prohibition lies against the judge. (*State v. State*, 278 Mo. 570, l. e. 582-583).

Two judges who sat when their opinion questioned petitioner's good faith (88 Fed (2d) 411) concurred in the opinion against petitioner herein.

In *Oakley v. Aspinwall*, 3 N. Y. 547, it was said:

"\* \* \* the first idea in the administration of justice \* \* \* is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause."

A trial by a biased official is not in accordance with due process. (*Tumney v. Ohio*, 273 U. S. 510, 50 A. L. R. 1243; *Morgan v. United States*, 304 U. S. 1). And so the petitioner was denied the benefit of the Due Process provision of the Fifth Amendment.

## X.

The reasons justifying the diversity of citizenship jurisdiction, as outlined in *Guaranty Trust Co. v. York*, 65 S. Ct. 1464, *Gaines v. Fuentes*, 92 U. S. 10, and *Bank of United States v. Deveaux*, 5 Cranch 303, as expressed in *Gaines v. Fuentes*, is:

"\* \* \* had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts."

The record herein discloses that, as to the federal courts, the principle has worked in reverse order.

So that the question of validity of the removal acts

is a most serious question to the parties and the administration of justice in this case.

# XI.

The Circuit Court of Appeals denied the Constitutional guarantee of rights and immunities to petitioner which insured to him the privilege of having those rights and immunities judicially declared and protected, by ignoring the allegations of petitioner's pleading referred to in Reason No. IV and substituting therefor the statement that

"\* \* \* he, as a resident of Missouri, has chosen to bring the action in the courts of his own State,"

and deciding that the controversy is not between petitioner as a citizen of the United States and respondent, a mere New York corporation, which contracted with petitioner in that capacity and that respondent's rights were governed by the principles quoted from *Gaines v. Fuentes*, 92 U. S. 10; whereas said case solely involved local prejudice and influence in a controversy between citizens of different States, as stated on page 11 of petitioner's reply brief in said Circuit Court of Appeals as follows:

"Appellee fails to answer the point that Mr. Kithcart, as a citizen of the United States, cannot be deprived of his fundamental privilege to maintain this suit in the state court.

"The authorities on which appellee relies deal only with citizens of different states and not United States citizens.

"Also said authorities are based on statutes enacted before the adoption of the XIVth Amendment, or cases based on principles stated in said authorities."

The District Court fell into a similar error.

The failure of the lower courts judicially to declare and protect petitioner's rights in the premises as a citizen of the United States denied to him the Constitutional guarantee of rights and immunities insuring petitioner the privilege of having those rights and immunities judicially declared and protected. (*Lawrence v. State Tax Commission*, 286 U. S. 276.)

## XII.

### Former Judgments Not *Res Judicata*.

Judgments in previous litigation were rendered in cases where petitioner misconceived or was mistaken in his remedy, and merely establish that reformation is necessary before petitioner can recover on his insurance contract.

Petitioner's misconception of his remedy in the litigation preceding this action for reformation did not thereby render the judgments in such misconceived actions *res judicata*. (*Wilson & Co. v. Hartford Fire Ins. Co.*, 300 Mo., l. c. 1; *Troxell v. Railway*, 227 U. S. 434, l. c. 442; *Brown v. Fletcher*, 182 Fed. 963; *National Surety Co. v. Jenkins*, 18 Fed. (2d) 707; *De Solar v. Hanscombe*, 158 U. S. 216; *Paper Products Co. v. Life Ins. Co.*, 204 Mo. App. 527; *Northern Assurance Co. v. Grandview Building Ass'n*, 203 U. S. 106, followed in *Baumhof v. Railway*, 205 Mo. 268; *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 294.)

The "subject matter" in the prior suits was *on the policy alone* (74), while the subject matter of this suit is the *actual insurance contract as made*. Hence the rule applies that

"The record of a former suit between the same parties is not conclusive unless the subject matter passed on in the former suit be the same with the dispute in the case at bar." (*Clemens v. Murphy*, 40 Mo. 121; *State v. James*, 82 Mo. 509).

The failure of the Court of Appeals to decide the question as to *res judicata* denied to petitioner a right well described by this Court in *Lawrence v. State Tax Commission*, 286 U. S., l. c. 282:

"But the Constitution, which guarantees rights and immunities to the citizen, likewise assures him of the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked."

The fact that petitioner did not cross-appeal prevented the Court of Appeals from having jurisdiction to raise the question of the Statute of Limitations itself. (*Maryland Casualty Co. v. Morley Construction Co.*, 300 U. S. 227.) This also applies to the failure of both courts to take notice of and decide the question as to whether petitioner's right as "a citizen of the United States" to maintain the suit in the State court under the XIVth Amendment was violated by removal to the Federal District Court and deciding said question on the theory that the case was between citizens of different states.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this Court be directed to the United States Circuit Court of Appeals for the 8th Judicial Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 13008, Civil, Boyd L. Kith-

cart, Appellant, vs. Metropolitan Life Insurance Company, a Corporation, Appellee, to the end that cause may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated October 18, 1945.

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*Attorneys for Petitioner.*